SUPREME COURT DECISION
No. 1686

In the Supreme Court of the State of Nevada.

Appealed from 1st. Judicial District Court, Lyon County.

C. F. Fox, Plaintiff & Respondent.

vs.

Mrs. Harriet Benard as executrix of the last will and testament of William M. Bernard, deceased, Mrs. Harriet Orth and J. C. Orth, Defendants and Appellants.

C. E. Mack and Geo. D. Pyne, Attys. for Respondent. ... ...

John Lothrops and A. Chartz, for Appellants.

Decision

On February 18, 1893, the plaintiff loaned $400 to William Bernard, now deceased, and to secure the payment thereof he deeded to plaintiff on that day the lands described in the complaint, and at the same time plaintiff executed to him a bond for a deed whereby he agreed to reconvey the property on or before February 18, 1898, provided that he was paid on or before that date $400, and also $36 annually. On February 8, 1896 plaintiff loaned Bernard the additional sum of $600 and accepted as security for $1000, and interest a deed made to plaintiff at the time he $400 was borrowed, and by release made in writing acknowledged and recorded, Bernard then relieved him from all obligations resulting from the bond made February 18, 1893, and thereupon plaintiff executed to Bernard a new bond, dated February 8, 1896, conditioned that plaintiff would make and deliver a good and sufficient conveyance of the property to Bernard, provided Plaintiff was paid $1000 on or before January 1, 1900 and also $30 annually, and further provisioned that if Bernard paid these amounts and the taxes he would be entitled to the use and possession of the premises A receipt and the statement or admission of Bernard a short time before his death indicate that the only payments were on interest to the 8th. day of February 1897. He died the following year and letters testamentary were issued to his widow Mrs. Harriet Bernard who has since married C. J. Orth. Plaintiff's demand arising out of the above transactions was presented against the estate and by her as executrix was rejected on August 29, 1898. There is testimony indicating that she had previously recognized the demand by endeavoring to borrow money for its payment. On July 24, 1901 the property was set over to her by decree of distribution. From a judgment decreeing the deed to plaintiff to be a morigage and ordering a foreclosure and sale of the premises to satisfy the amount, $1731.25 and $76.49 costs, found due to plaintiff, she appeals.

The well settled doctrine that a deed executed merely for the purpose of securing a debt will be construed as a mortgage is not assailed, but for appellant it is contended that as suit was not brought until April, 1904, more than six years after the last loan and the giving of the last bond on February 8, 1896, and more than four years after the time, January 1, 1900 fixed for a conveyance thereunder conditioned on payment, the action is barred by the statute of limitations. It is said that by executing a written release of the first bond and accepting a new one instead, at the time he borrowed the last amount, $600, Bernard did not sign any writing agreeing to pay or acknowledging a debt, and that therefore the obligation to pay on his part was merely verbal and would be barred in four years. We do not so view that transaction. Most instrument in daily use, such as deeds mortgages, notes, orders, drafts and checks are signed by only one of the parties, but are not for that reason verbal nor half verbal. Although Bernard executed no note or writing agreeing to pay any money, he signed a deed absolute in terms conveying the property to plaintiff, and by this suit and the decree no more is sought than he under his signature obligated himself to yield. In equity the extension of the time for a reconveyance by plaintiff, given by the surrender of the first bond and the execution of a new one ought to be considered as effective as if plaintiff had conveyed the property to Bernard and taken new deed from him, which would have left the title in plaintiff as it now stands. It was not necessary to have these extra deeds and if they had been executed they would not have varied the time for bringing suit and the initiation of the running of the statute which was controlled by the last bond and the date therein fixed and extended for payment and reconveyance.

Plaintiff is fortified with a writing for all that is awarded him by the judgment and for more if the property is worth more.

The loan and giving of the security which vary the unconditional terms of the deed, and which are shown verbally, are facts favorable to appellant which it would have been incumbent upon her to prove if plaintiff had sued in ejectment for the property and introduced the deed. The bringing of the action four years and four months after January 1, 1900, the time fixed in the last bond for a reconveyance conditioned on payment, was not too late.

It is also urged that suit was not begun within the time required by the provisions of the Probate Act after the rejection of the claim by the executrix. Whether this is so is immaterial for although she as executrix is named as a party defendant, the allegations of the complaint and the decree may be considered as running against the property only. No judgment for any deficiency after sale or otherwise against the estate is demanded or given by the decree, which is directed only against the premises and plaintiff's rights to this extent would not be curtailed nor affected by failure to present a claim to the executrix, nor by her rejection of the claim filed, nor by his ommission to sue within the time prescribed for commencing actions on rejected claims against estates of deceased persons, as is necessary when it is desired to reach the assets of the estate.

In Cookes V. Culberston, 9 Nev. 207, as here, a deed was given as security for a loan which was not evidenced in writing. It was said in the opinion "The remedy upon the debt is barred by the statute, but the debt was not thereby extinguished; and as the statute of limitations of this State applies to suits in equity as well as actions at law, the creditors could have entered payment by foreclosure of the mortgage within four years after the cause of action accrued. He had two remedies, one upon the debt, the other upon the mortgage: by losing one he does not necessarily lose the other." Since the rendition of the decision the time for commencing actions on written instruments has been extended from four to six years and under well recognized principles plaintiff was allowed that length of time after the date fixed for payment of the $1000 and for the termination of the bond or a re-conveyance, which was January 1, 1900. As said in Borden V. Clow, 21 Nev. 278, "It is a rule in regard to the statute of limitations that the statute begins to run when the debt is due and an action can be instituted upon it." Under the argument for appellant the four years from the final loan on February 8, 1896 to the time for payment of the $1000 under the bond on January 1, 1900, would be deducted from the six years allowed for bringing suit, and on that theory if the maturity of the loan had been more than six years, instead of four plaintiff's cause of action would have been barred before it accrued.

The judgment of the District Court is affirmed.

TALBOT, J.

We concur.

Fitzgerald, C. J.

Norcross, J.

Carson Cemetary Water Wards

Notice is hereby given that water has been turned on at the Cemetary and that no person in arrears will be allowed the use of water until the amounts now due are paid.

Patrons are further notified that it is the intention of the Trustees to give a six months service this season, instead of five months as heretofore, to do this prompt payment by water users will be neccessary.

April 24, 1906 GEO. W. KEITH
Secretary and Collector.

Lost

A pair of eye glasses with gold chain attached, in case. The finder will be rewarded by leaving the same at this office. tf

SUPREME COURT DECISION
No. 1681.

In The Supreme Court of the State of Nevada.

William J. Brandon, Appellant, vs. N. H. West, as Administrator of the Estate of B. C. Clow, Deceased, et al., Respondents.

Messrs. Mack and Farrington, for Appellant

Messrs. Cheney and Massey for Respondents.

From the 2nd Judicial District Court Washoe County.

On Petition for Rehearing

The respondents petition for a rehearing in this action, or modification of the order entered therein, on the following grounds: That no appeal was ever taken from the judgment herein; that the only appeal which was taken was from the order denying plaintiff's motion for a new trial, and the jurisdiction of this court is limited to affirming or reversing that order; and that the order entered directing judgment for plaintiff is not warranted even had an appeal been taken from the judgment.

It is contended that the record on appeal does not contain the judgment roll and, consequently, that there can be no appeal from the judgment.

The notice states that the appeal is from the judgment, as well as the order denying the motion for a new trial. The undertaking on appeal is conditioned for the payment of costs on appeal from the judgment The transcript is entitled: "Statement on Motion for New Trial and Appeal." Copies of all the papers required under Compiled Laws Sec. 3360 to be embodied in the judgment roll, with the exception of the summons, are contained in the transcript. There was no motion made to dismiss the appeal from the judgment because of any alleged defect therein, nor was the sufficiency or regularity of the appeal questioned upon the presentation of the cause. The case was briefed, argued and presented as though the appeal was entirely regular. Its sufficiency, therefore, cannot now be questioned upon petition for rehearing.

It is urged that this Court, in any event, ought not to have directed that judgment be entered in favor of the appellant, upon reversal of the judgment, but that all that was proper to be done under such circumstances, was the granting of a new trial, the rule being, "that where there is an issue upon material facts, which may possibly be decided in more than one way on another trial, there should be a new trial ordered on a reversal of the judgment."

Upon the trial of this cause the respondents offered no evidence, the submitting the case upon the testimony offered by the plaintiff. The court ordered judgment in favor of Defendants. Findings prepared by defendant's counsel, which negatived the allegations of plaintiff's complaint that there was a sale of the land described therein, were approved by the court. Counsel for the plaintiff moved to strike out the findings so allowed and made request for certain other findings. Upon the hearing of this motion and request, the court made, among others, the additional finding relative to the sale of the sand to the plaintiff and the right or license to remove the same, in pursuance of which finding judgment was ordered by this Court to be entered in favor of appellant. Counsel for respondent though participating in this hearing, may not have been called upon to except to this finding, if objections were had thereto, but, in any event, no objection was made or exception taken. In plaintiff's assignments of error in his statement on motion for a new trial and appeal the point is twice made that it was error in the Court not to give plaintiff judgment in accordance with this finding. Counsel for appellant in their opening brief take the position that they were entitled to judgment at least to the extent of the sand and the exclusive license to remove the same as found by the trial court. They close their brief with the following paragraph:

"Wherefore plaintiff and appellant prays that, inasmuch as all the evidence is before the court the judgment be modified by directing the defendants to execute a deed of said property to plaintiff; and should the court find that plaintiff is not entitled to the relief prayed for in the complaint, but is entitled to the lesser relief of a deed to the sand and exclusive rights to remove the same, that the judgment be modified accordingly.

It will be seen, therefore, that whether judgment by this Court should be ordered entered in favor of the plaintiff upon the findings as they stood was squarely before the Court. There was no intimation in respondents' brief that in the event this Court should conclude that the finding as to the sale of the sand was supported by the evidence and that the trial court should have given judgment to that extent in favor of the plaintiff, that this Court ought not to make an order directing such a judgment to be entered instead of remanding the case for a new trial. There was no suggestion that, in the event this Court agreed with the contention of appellant that judgment should have been entered in favor of the plaintiff upon the findings, that a new trial should be ordered so that the defendants might have opportunity to show evidence upon the issues or that they had any evidence that might be so offered.

Counsel for respondents in the presentation of this case upon the hearing on appeal took the sole position that under the pleadings, findings and evidence the appellant was entitled to no relief whatever. Although counsel for appellant was asking that judgment be ordered entered in favor of plaintiff in accordance with the finding relative to the sale of the sand, this finding is no where directly attacked in respondents' brief; in fact it is not denied that the evidence was sufficient to establish a sale of sand and a license to remove the same, although it was and is claimed that the proofs as to the limits within which the sand might be taken were too indefinite.

Under this state of facts, we think the contention now made for the first time, that the course pursued by this Court was not a proper one, also, comes too late. It is the rule that no new ground or position not taken in the argument submitting the case, or question waived by silence, can be considered on petition for rehearing Powell vs N. C. O. Ry. Co., 28 Nev. 82 Pac. 97; Beck vs Thompson, 29 Nev. 421.

It was contended by counsel for respondent upon the presentation of this case and is again urged in the petition for rehearing that there was no satisfactory proof of the boundries of the land referred to in the complaint and within which the sand has been held to have been sold to the plaintiff This point was considered although not referred to in the original opinion. There was testimony to the effect that two of the sides, the South and the East, were laid out in the presence of B. G. Clow and the plaintiff and at Clow's direction. Counsel in their petition now only contend "that the record on appeal, fairly considered, fails to show that the Western boundary of the land claimed by appellant was ever indicated or marked by B. G. Clow." As the land in question is triangular in shape, the establishment of two of the sides would necessarily establish the third.

The petition for rehearing is denied.

TALBOT, J.

I concur:

Norcross, J.

I dessent:

Fitzgerald, C. J.

People You Like to Meet.

Are found on the through trains of the Sante Fe Route. First-class travel is attracted to first class roads. The Sante Fe Route is a first-class road.

It is one of the three largest rail way systems in the world. Present mileage, 7,734 miles.

It extends from Lake Michigan to the Pacific Ocean and Gulf of Mexico, reaching with its own rails, Chicago, Kansas City, Denver, Fort Worth Galveston, El Paso, Los Angeles and San Francisco.

It runs the finest and fastest trans continental train, the California Limited.

Its meal service, managed by Mr. Fred Harvey, is the best in the world

Its track is rock ballasted and laid throughout with heavy steel rails.

On such a road as this long distance records are frequently shattered, the latest being that of the "Scotty Special" Los Angeles to Chicago, 2,265 miles in less than 45 hours.

Every comfort and luxury desired by modern travelers.

May we sell you a ticket over the Santa Fe.

G. F. WARREN, A. T. & S. F. RY.
Salt Lake City, Utah.
Or—F. W. PRINCE, San Francisco.

Dissolution of Partnership

The copartnership heretofore existing under the style and name of Petersen and Springmeyer, in the City of Carson, County of Ormsby, has been dissolved by mutual consent. Mr. Petersen having purchased the entire interest of C. H. Springmeyer. Mr. Petersen will pay all outstanding claims against said firm and will collect all claims due the firm.

Notice

A rumor having gone about that I had advanced the price of drugs since the recent earthquake and fire in San Francisco, I wish to state here that the report is without foundation and absolutely false in every particular.

F. J. Steinmetz.

ANNUAL STATEMENT

Of The Continental Casualty Company Of Hammond Indiana.
General office, Chicago, Ills.

Capital (paid up)	$ 200,000 00
Assets	1,708,611 28
Liabilities, exclusive of capital and net surplus	1,157,641 70

Income

Premiums	2,129,749 64
Other sources	30,476 72
Total income, 1905	2,160,226 36

Expenditures

Losses	993,904 92
Dividends	16,500 00
Other expenditures	1,113,131 64
Total expenditures, 1905	2,123,536 45

Business 1905

Risks written	none
Premiums	2,633,875 22
Losses incurred	1,009,644 81

Nevada Business

Risks written	none
Premiums received	29,025 56
Losses paid	8,544 59
Losses incurred	8,634 55

A. A. SMITH, Secretary.

SPECIAL EXCURSION FROM SAN FRANCISCO TO CITY OF MEXICO AND RETURN. DECEMBER 16th, 1905.

A select party is being organized by the Southern Pacific to leave San Francisco for Mexico City, December 16th, 1905. Train will consist of fine vestibule sleepers and dining car, all the way on going trip. Time limit will be sixty days, enabling excursionists to make side trips from City of Mexico to points of interest. On return trip, stopovers will be allowed at points on the main lines of Mexican Central, Santa Fe or Southern Pacific. An excursion manager will be in charge and make all arrangements.

Round trip rate from San Francisco $80.00.

Pullman berth rate to City of Mexico, $12.00.

For further information address Information Bureau, 613 Market street, San Francisco Cal.

Liberal Offer

I beg to advise my patrons that the price of disc records (either Victor or Columbia), to take effect immediately, will be as follows until further notice:

Ten inch disks formerly 75 cents will be sold for 60 cents.

Seven inch records formerly 50c, now 35c. Take advantage of this offer. C. W. FRIEND.

Notice to Hunters

Notice is hereby given that any person found hunting without a permit on the premises owned by Mr. Theodore Winters, will be prosecuted. Limited number of permits will be sold at $5 for the season or 50 cents for one day

OFFICE COUNTY AUDITOR

To the Honorable, the Board of County Commissioners, Gentlemen

In compliance with the law, I herewith submit my quarterly report showing receipts and disbursements of Ormsby County, during the quarter ending Dec. 30, 1905.

Quarterly Report.
Ormsby County, Nevada.

Balance in County Treasury at end of last quarter 39108 77¾
County license 699 15
Gaming license 1057 50
Liquor license 582 00
Fees of Co. officers 527 05
Fines in Justice Court 125 00
Rent of Co. building 302 50
Ind. Inst taxes 103 43¾
Slot machine license 252 00
S. A. apportionment school money 5424 48
Delinquent taxes 181 40
Cigarette license 42 30
Douglas Co., road work 18 00
Roop W. Bowen 45 00
Keep C. B. Hall 15 00
Total 4213 59¾

Recapitulation

April 1st., 06. Balance cash on hand	$31277 17¾
State fund	713 73⅛
General fund	4212 28⅝
Salary fund	736 64
Co. school fund	47 69
Co. school fund Dist. 1	10158 48½
Co. school fund Dist. 2	189 14
Co. school fund Dist. 3	277 67½
Co. school fund Dist. 4	212 77
State school fund Dist. 1	3859 85
State school fund Dist. 2	216 18
State school fund Dist. 3	433 76
Agl. Assn fund A.	686 12½
Agl. Assn. fund B.	92 16½
Agl. Assn. fund Spcl.	1829 54
Co. school fund Dist. 1 Spcl	7290 20
Co. school fund Dist. 1 library	108 40
Co school fund Dist. 3 library	6 50
Co. school fund Dist. 4 library	6 50
Total	$31277 17¾

H. B. VANNETTEN
County Treasurer.

Disbursements

General fund	4203 67
Salary fund	2560 00
County school fund	60 00
Co. school fund Dist. 1	338 65
Co. school fund Dist. 2	173 10
Co school fund Dist. 3	19 85
Co. school fund Dist. 4	122 00
State school fund Dist 1	2811 65
State school fund Dist 2	240 00
State school fund Dist 3	120 00
State school fund Dist 4	110 00
Co. school fund	60 00
Co. school fund Spcl building	6377 50
Total	16936 42

Recapitulation

Cash in Treasury January 1, 1906	39108 77¾
Receipts from January 1st to March 31st 1906	9104 81¾
Disbursements from January 1st to March 31st 1906	16936 42
Balance cash in Co. Treasury April 1st 1906	31277 17¾

H. DIETERICH
County Auditor